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No. 01-1626

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

RAFIDAIN BANK,

*Petitioner,*

*v.*

FIRST CITY, TEXAS-HOUSTON, N.A.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF

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## STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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In this action, the extraordinary imposition of the civil contempt power by the district court against a foreign state was based solely on a determination made by the Second Circuit that Petitioner was still a "party" to this action, notwithstanding the fact that a final judgment on default had been entered against Petitioner seven years earlier. *First City, Texas-Houston, N.A. v. Rafidain Bank and Central Bank of Iraq*, 150 F.3d 172 (2d Cir. 1998) ("First City I"); App. at 42a. In light of this history, for the Respondent to argue that this Court "need not consider, whether [Petitioner] was still a 'party' to the lawsuit when the 1998 Subpoena was served" borders on the frivolous.

It is uncontested that both the district court's initial order holding Petitioner in contempt, and the district court's subsequent order denying Petitioner's motion to vacate the contempt order, which is the subject of this Petition, were premised solely and entirely on the Second Circuit's finding that Petitioner was still a "party" to this action. As the district court clearly stated in its Opinion and Order dated November 8, 2000, denying Petitioner's motion to vacate:

> In moving to vacate the Court's order of November 1, 1999 holding Rafidain in civil contempt for failure to comply with the 1998 Rafidain Subpoena, Rafidain argues, first and foremost, that the Court lacked authority to impose such an order because Rafidain by that time was no longer a party to this lawsuit and was exempt under the FSIA from being subject to third-party discovery. The first premise of the argument is effectively foreclosed, however, by the Court of Appeals' express finding that "Rafidain is a party to this suit" and that "the district court is instructed to permit First

> City to conduct full discovery against Rafidain." *First City*, 150 F.3d at 177. While Rafidain was not a party to the appeal in which the Court of Appeals made these determinations and therefore may have a basis in some future appeal for asking the Court of Appeals to reconsider its conclusions in this regard, it would exceed the power of this lower court to disregard these clear and unequivocal determinations of the Court of Appeals. The Court therefore finds, in compliance with the Second Circuit's ruling, that Rafidain remains a party to this action.

*First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250 (S.D.N.Y. 2000); App. at 29a.[1]

The district court's ruling that Petitioner remained a "party" to the litigation was essential to its exercise of subject matter jurisdiction to enforce the subpoena, because the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA"), does not provide for non-party discovery against foreign states or their instrumentalities. Moreover, the jurisdictional statute itself, 28 U.S.C. § 1330(a), limits the subject matter jurisdiction of the district courts over foreign states to "claims for relief in personam" pending against the

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1. The Second Circuit's ruling that Petitioner was a "party" to this action was also critical to the district court's determination that it had obtained personal jurisdiction over Petitioner by virtue of the service of a copy of the subpoena upon the attorneys who had previously represented Petitioner in the litigation. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250; App. at 31a ("Service of the 1998 Rafidain Subpoena — which, among other things, was served on the only law firm that had ever appeared for [Petitioner] up to that time . . . more than met the requirements of *service on a party*.") (emphasis added).

foreign state. There are no such claims currently pending in this litigation against Petitioner, and have not been since 1991. Thus, as the district court itself aptly stated in its Memorandum Order granting Petitioner's motion for a stay pending appeal:

> [I]t is undisputed that the subpoena is valid *only if Rafidain is still a party* to the ongoing case against Central Bank of Iraq . . .

*First City, Texas-Houston, N.A. v. Rafidain Bank*, 131 F. Supp. 2d 540 (S.D.N.Y. 2001) (emphasis added); App. at 18a-19a.

In its second bite at the apple, the Second Circuit attempted (*sua sponte*) to abandon its original rationale, and upheld the district court's jurisdiction on a totally new ground, never advanced by Respondent or addressed by the parties, namely, that the 1998 Subpoena was not a discovery subpoena issued pursuant to its instruction to permit "full discovery" against Petitioner, but rather an asset identification subpoena in aid of enforcement of Respondent's judgment against Petitioner. However, in this Petition, Petitioner asks this Court to see the Second Circuit's second decision for what it really is — a *post hoc* rationalization intended to justify and salvage an earlier decision which was jurisdictionally erroneous and which the Court recognized could not be sustained on its original grounds.

We respectfully submit that, based upon this troubling record, this Court should grant certiorari for two separate but equally important reasons: first, because the legal bases contrived by the Second Circuit to mitigate the error in its original decision makes bad law on two significant issues concerning the subject matter jurisdiction and personal jurisdiction of the district court over foreign states; and

second, because, as the court of last resort of the United States of America, this Court has a particular responsibility to see that foreign states — including unpopular foreign states such as Petitioner — are treated fairly by the American judicial system, and with the comity and respect to which they are entitled as independent sovereign nations.

## A. The 1998 Subpoena Was Not An Asset Subpoena

The principal argument asserted by Respondent in opposition to this Petition is that the issue of whether the Second Circuit properly characterized the 1998 Subpoena as an information subpoena in aid of a money judgement "is not the kind of fact finding [] this Court should review." Respondent's Brief in Opposition at p. 5. When then, one may fairly inquire, *was* the appropriate occasion for Petitioner to address this issue? Since no participant in these proceedings — not the district court; not the Second Circuit; and certainly not the Respondent itself — ever sought to justify the district court's subject matter jurisdiction on the ground that the 1998 Subpoena was really an asset identification subpoena, until the Second Circuit issued its second decision in this matter, the Petitioner has never had a reason or opportunity to address this issue before now. Understandably, all of Petitioner's arguments before the Second Circuit addressed the grounds stated by the district court for its decision, namely, that in accordance with *First City I*, Petitioner is a party to this action. Thus, to preclude Petitioner from contesting the issue now, before this Court of last resort, would be tantamount to denying Petitioner any opportunity to contest the sole ground upon which the finding of contempt and imposition of sanctions has now been upheld.

It is undisputed that, at the time Respondent served the 1998 Subpoena, Respondent itself claimed that the 1998 Subpoena sought only "jurisdictional discovery" for use in opposing the motion of the sole surviving party, Central Bank of Iraq ("Central Bank") to dismiss on grounds of sovereign immunity and lack of subject matter jurisdiction. Thus, for example, in its brief before the Second Circuit, Respondent characterized the 1998 Subpoena as follows:

> [Petitioner's] refusal to comply with First City's requests for jurisdictional discovery dates back to 1995 and continues to this day, despite this Court's 1998 Opinion. That Opinion reversed the 1997 dismissal of this case and remanded it to give First City an opportunity to conduct discovery that this Court held had been cut off prematurely. This Court expressly determined that [Petitioner} should first provide First City with jurisdictional discovery.

Brief for Plaintiff-Appellant First City, Texas-Houston, N.A., dated May 10, 2001, at 1 (citations omitted). Similarly, at pages 5 and 6 of the same brief, Respondent wrote:

> On September 14, 1998, First City served Rafidain with a subpoena duces tecum seeking jurisdictional discovery (the "1998 Subpoena"). . . . Rafidain chose to ignore the subpoena. First City moved to hold Rafidian in contempt for its failure to respond to First City's September 1998 subpoena . . . First City also moved to compel Central Bank to respond to discovery . . . Having unsuccessfully sought to procure jurisdictional discovery against Rafidain, First City argued that it was entitled to at least some further discovery from Central Bank . . .

*Id.* at pp. 5 and 6.

It is clear, moreover, that Respondent fully understands and appreciates the difference between an ordinary discovery subpoena, such as the 1998 Subpoena, and an information subpoena in aid of execution of a judgement, since it separately served both kinds of subpoenas on Petitioner. Indeed, the distinction was clearly drawn by Respondent in its own characterization of the two subpoenas in its brief to the district court in opposition to Petitioner's motion for a stay pending appeal. As Respondent then wrote:

> Rafidain's request that it not be required to respond to the 1998 subpoena, which seeks the discovery the Second Circuit directed to go forward [*i.e.*, "full discovery"], and the 2000 Rafidain Subpoena, which seeks post-judgment asset discovery, pending its appeal of the Court's Orders is unjustifiable.

First City, Texas-Houston's Brief in Opposition, dated February 2, 2001, at p. 7. Thus, in Respondent's own words, the 2000 Subpoena was an asset discovery subpoena; the 1998 Subpoena was not.

Although Petitioner appreciates the fact that drawing such distinctions between the scope and nature of two subpoenas may not be the usual grist of this Honorable Court's docket, we respectfully submit that, in this extraordinary case, this Court cannot do justice, and fairly consider Petitioner's arguments, unless it is prepared to look behind the Second Circuit's self-serving re-characterization of the 1998 Subpoena, to view the true facts and issues presented by this Petition. If, as Petitioner contends, and as the district court itself articulated when it held Petitioner in contempt, the 1998 Subpoena was a discovery subpoena, served in accordance with the Second Circuit's direction to

permit "full discovery" against Petitioner for the purpose of establishing jurisdiction over Respondent's claim against Central Bank, then the district court's subject matter jurisdiction to enforce the subpoena against Petitioner can only be upheld if either: (i) Petitioner was still a party to this action, as the district court, following the Second Circuit, felt itself constrained to hold; or (ii) if the FSIA and 28 U.S.C. § 1330(a) grant the district court subject matter jurisdiction to permit "full discovery" against foreign states who are not parties to a current action.

Since both the Second Circuit and Respondent have abandoned the position that Petitioner is a party to this action, the district court's subject matter jurisdiction can only be upheld on the second ground, *i.e.*, that the district court may assert subject matter jurisdiction to compel non-party discovery against foreign states. As discussed in the Petition, this is an issue of first impression in the courts of the United States, and the Second Circuit's decision, if permitted to stand, would make bad law which would violate both the express limitations on the district court's subject matter jurisdiction established by Congress in 28 U.S.C. § 1330, as well as long accepted principles of international law. Accordingly, the Petition should be granted on the first two questions presented in the Petition.

### B. "Actual Notice" Is Not Sufficient To Uphold Personal Jurisdiction If Service is Not Accomplished In Accordance With the Parties' "Special Arrangement"

Respondent is correct that there is no factual dispute concerning the method of service attempted by Respondent with respect to the 1998 Subpoena. Service was attempted in clear violation of the parties' "special arrangement," which required service by registered mail. Instead, Respondent sent

a process server to knock on the door of the Iraqi Mission to the United Nations, with predictable results. Service was not accepted, and a confrontation ensued between the process server and some unnamed person at the Mission.

Notwithstanding Respondent's failure to serve the subpoena in accordance with the parties' agreement, both the district court and the Second Circuit found that service was accomplished because Petitioner received "actual notice" of the subpoena, essentially by "nail and mail." [2] Contrary to Respondent's curious argument, however, this holding raises a significant issue of law, not fact, concerning the applicability of the "actual notice" rule to service of process on foreign states governed by Section 1608(b)(1) of the FSIA, *i.e.*, where, as here, the parties have agreed to a specific "special arrangement" for service of process.

For the reasons discussed in the Petition, the Second Circuit's application of the "actual notice" rule to service

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2. Significantly, the district court's decision finding service to have been sufficient specifically relied upon the Second Circuit's ruling that Petitioner was a party to the action, stating:

> As a party, Rafidain was subject to providing such discovery pursuant to Rules 26 though 37 of the Federal Rules of Civil Procedure. Service of the 1998 Rafidain Subpoena — which, among other things, — was served on the only law firm that had ever appeared for Rafidain up to that time . . . more then met the requirements for service on a party.

*First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250; App. at 31a. It is thus highly questionable whether the district court itself would have upheld Respondent's method of service if it had not been constrained by the Second Circuit's finding, now implicitly revoked, that Petitioner is a "party" to the action.

governed by Section 1608(b)(1) is without precedent, and would seriously undermine the Congressional intent behind section 1608(b)(1), which was to "minimize the potential irritants to relations with foreign states" by encouraging foreign states to negotiate an agreed-upon method of service. H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976). Nothing could be more calculated to subvert, rather then encourage, the willingness of foreign states to negotiate such "special arrangements," as well as to heighten suspicions of partisanship and bias, then the courts' failure to enforce such agreements as written, whether or not "actual notice' is received by some other method of service.

## CONCLUSION

Respondent's arguments against granting the Petition continue a disturbing pattern.

First, the district court declined even to consider Petitioner's jurisdictional arguments in support of its motion to vacate the contempt order, on the ground that it was foreclosed by the Second Circuit's finding that Petitioner is a party, despite the fact that Petitioner was not a participant in the appeal in which this issue was raised (and decided) solely by the appellate court. The issue of the district court's subject matter jurisdiction to enforce the subpoena was never briefed or argued before the Second Circuit by any party.

Next, the Second Circuit, backpedaling from its initial decision, upheld the contempt order against Petitioner on a new ground, not only entirely different from the ground upon which the district court acted, but moreover a ground (once again) never advanced by Respondent, and which Petitioner consequently had no opportunity or occasion to address.

Now, Respondent comes before this Court and argues that this Court should not grant certiorari to hear Petitioner's arguments in opposition to the Second Circuit's new decision, because the Second Circuit's decision is based upon supposed findings of fact, not law, even though said purported "findings" were made by the Second Circuit *sua sponte*, without affording Petitioner any opportunity to address or rebut them in advance of the Court's issuing its decision.

There is something radically wrong with the procedural history described above. It is true that Petitioner originally ignored the subpoena, and failed to contest the entry of the contempt order, before moving to vacate. But, as the district court properly observed, that is an accepted and legitimate manner in which a party may proceed to challenge the court's jurisdiction.

What is not legitimate, and, we submit, requires serious review by this Honorable Court, is the Petitioner's treatment at the hands of the Second Circuit, which has twice decided issues against the Petitioner, leading to the extraordinary imposition of contempt and sanctions against a foreign state, without ever permitting Petitioner the opportunity to address the grounds upon which the Second Circuit made its rulings.

In a very real sense, Petitioner has been deprived of the due process of law, not to mention fundamental fairness, by the actions of the federal courts below. Such roughshod treatment of an independent foreign nation should not be allowed to stand.

The questions raised in the Petition concerning the subject matter jurisdiction and personal jurisdiction of the districts courts to compel discovery against non-party foreign states are real and substantial, and could have a broad impact upon litigation against foreign states in the federal courts.

For both of these reasons, the Petition should be granted.

Respectfully submitted,

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